UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES POSTAL SERVICE	)	
	)	
Respondent	)	
	)	
and	)	**CASE 7-CA-142926**
	)	
BRANCH 256, NATIONAL ASSOCIATION OF LETTER CARRIERS (NALC), AFL-CIO,	)	
	)	
Charging Party.	)	
	)	

BRIEF OF *AMICUS CURIAE* NATIONAL RURAL LETTER CARRIERS' ASSOCIATION

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I. INTRODUCTION

The National Rural Letter Carriers' Association ("NRLCA" or "Union" or "*Amicus*") is an independent labor union that serves as the exclusive bargaining representative for approximately 115,000 United States Postal Service rural letter carriers – the third largest bargaining unit in the agency. The men and women of the NRLCA deliver mail on over 70,000 routes, in all fifty states, Puerto Rico, and the U.S. Virgin Islands.

Pursuant to the Postal Reorganization Act ("PRA"), the National Labor Relations Act, 29 U.S.C. § 151, *et. seq.* governs labor relations in the Postal Service, except where the PRA states otherwise. 39 U.S.C. § 1209(a).

II. INTEREST OF AMICUS CURIAE

On February 19, 2016, the NLRB issued an Order Granting Special Permission to Appeal and Invitation to File Briefs ("Order and Invitation") in this case, requesting input from interested *amici* on two questions:

1. May the Board, consistent with Section 3(d) of the National Labor Relations Act, continue to permit administrative law judges to issue a "consent order," subject to review by the Board, incorporating the terms proposed by a respondent to settle an unfair labor practice case, to which no other party has agreed, over the objection of the General Counsel?

2. If Section 3(d) does allow the Board's current practice, should the Board alter or discontinue the practice as a matter of policy?

Amicus submits this brief in response to the February 19 Order and Invitation to urge the Board to reconsider this policy. Given the NRLCA's experience filing unfair labor practice charges against the Postal Service for over forty years, *Amicus* believes the instant case demonstrates why the imposition of settlement terms through consent orders

over the opposition of both the General Counsel and the charging party does not effectuate the purpose of the Act. Thus, the Board should discontinue its practice of granting such consent orders.

III. ANALYSIS

1. Section 3(d) Does Not Authorize the Board to Permit Administrative Law Judges to Impose Unilateral "Settlements" Without Consent from the General Counsel

Currently, the Board permits Administrative Law Judges ("ALJs") to unilaterally "settle"[1] unfair labor practice complaints, as occurred here. *Amicus* strongly believes this policy to be inconsistent with Section 3(d), which clearly imbues the General Counsel with sole and "final authority" in prosecuting unfair labor practice complaints. 29 U.S.C. § 153(a).[2] The NRLCA understands that other *amici*, including the National Association of Letter Carriers ("NALC") have fully addressed this issue in their submissions to the Board. The NRLCA hereby adopts and incorporates the position taken by the NALC in its *Amicus* brief on this issue.

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[1] More than once, the Board has acknowledged that unilateral consent orders do not constitute true settlement agreements. *See*, *Enclosure Suppliers*, Case 9-CA-46169, fn. 2 (2011)("the resolution of an unfair labor practice by a unilateral agreement proffered by a respondent and approved by a judge is in the nature of a consent order, and is not a true 'settlement' between parties to the dispute") (citing *Electrical Workers IUE Local 201 (General Electric Co.)*, 188 NLRB 855, 857 (1971)); *The Heil Co.*, Cases 10-CA-114054, 114919, 116293 (2014).

[2] ALJs, on the other hand, have the explicit authority to implement their factual findings and opinions about the appropriate remedial relief – if any – by issuing decisions on the merits after a full and fair hearing.

2. Even if Section 3(d) Permits the Board to Authorize Administrative Law Judges to Impose Unilateral Settlements on the General Counsel and Charging Party, the Board Should Discontinue This Practice Because it Does Not Effectuate the Purposes of the Act

Historically, the NRLCA has prided itself on being a Union that works with management to resolve issues before resorting to formal disputes such as filing unfair labor practice charges. Believing that labor-management relations is best served when Union representatives can sit down and work out problems that affect the bargaining unit, *Amicus* has made sparing use of the Board's resources over the years. When we do file charges, Regional Directors often encourage a settlement process that allows for input from all parties and frequently results in a Board or non-Board settlement agreement. Although not perfect, this process at least gives the charging party and the General Counsel a voice in evaluating whether the Act has been properly enforced and its policies effectuated. Indeed, this was the very process at work in *Independent Stave* – the case relied upon by the ALJ here in granting the Postal Service's request for a unilateral settlement. *Independent Stave Co.*, 287 NLRB 740 (1987). In that case, the Board approved private settlement agreements that the charging parties freely entered into with the employer. Although the General Counsel objected, the settlements reflected the mutual agreement of the two parties to, and most affected by, the dispute.

As in *Independent Stave Co.*, each side to a charge – the General Counsel and charging party on one side and the charged party on the other are key to an effective remedy. However each of those voices becomes impotent when an ALJ authorizes a "settlement" on the terms set and agreed to solely by the very entity that violated the Act, as happened in the instant case. Perhaps this is why the Board has previously expressed

"grave concerns" about approving such one-sided "settlements." *See, The Heil Co.*, Cases 10-CA-114054, 114919, 116293 (2014).

Amicus believes that it is time for the Board to examine its "grave concerns" more closely and to cease its practice of permitting ALJs to impose unilateral settlements via consent orders over the objections of the General Counsel and charging party. Unilaterally imposed "settlements" – especially those issued in the absence of a full and fair hearing, as in this case – increase the likelihood of leaving the charging party and General Counsel with an inadequate remedy. Such outcomes fail to effectuate the purposes of the Act. Indeed, they discourage "the practice and procedure of collective bargaining" and the incentives to reach "mutually agreeable settlements without litigation;" they fail to protect workers' rights; and they adversely impact harmonious labor-management relations. See, 29 U.S.C. § 153(a); *287* NLRB at 741. This case and *Amicus'* experience filing unfair labor practices against the Postal Service demonstrate this point all too well.

a. Unilateral Settlement Agreements Increase the Likelihood of Ineffective Remedies, Which Run Counter to the Policies Underlying the Act

In the instant matter, the ALJ approved a unilateral settlement that includes a non-admission clause and six-month sunset provision for an acknowledged recidivist. She also limited the remedy to a single Postal facility. As set forth below, the NRLCA has extensive experience with the Postal Service and can attest to its recidivism. Such an incomplete unilateral remedy as that imposed through a consent order here does little to ensure that a serial violator of the Act will take the steps necessary to prevent future violations. It also sends the message to union members that the NLRB will take minimal

steps to protect their rights even when an employer threatens adverse consequences for employees who call upon their union to invoke their rights – as happened here. To understand why, it is necessary to look into the nature of the Postal Service's relationship with the NLRB and the NRLCA's experience with the Postal Service's recidivism.

The decision to approve the unilateral settlement in this case is part and parcel of an all-too lenient approach that the NLRB has shown towards the Postal Service when it has committed unfair labor practices. Perhaps because of the Postal Service's size and geographic scope, the Board too easily lets the Postal Service off the hook by applying special rules limiting the applicable remedies or even giving the Postal Service multiple opportunities to correct its unlawful behavior – opportunities that are not granted to other employers. For example, the Board allows for a special alternative dispute resolution ("ADR") mechanism for Postal Service *Weingarten* violations. GC Memorandum OM 14-78.[3] Whereas the Board typically issues a complaint against any other employer deemed to have violated an individual's *Weingarten* rights, it engages in a more forgiving ADR process with the Postal Service, including an opportunity to correct the violation by granting a new investigative interview. *Id.* Similarly, the Postal Service grants the Postal Service a special 14-day window to correct failures to provide information to its unions – something that occurs all too frequently in Postal facilities across the country. Memorandum OM 03-18. *Amicus* knows of no other employer that enjoys such special treatment.

[3] Somewhat troubling is the fact that this alternative dispute mechanism is applied to the Postal Service in all *Weingarten* cases including those involving members of the NRLCA or other unions that were not part of the original case or settlement agreement.

The NRLCA has often found itself on the losing side of this lenient and shortsighted approach towards handling Postal Service unfair labor practices. More often than not, NLRB Regional Directors ("RDs") choose to issue "merit dismissals" rather than complaints when the Postal Service refuses to provide information in response to multiple Union information requests. The common refrain from these RDs is that the particular post office involved is not a repeat violator. In other words, according to numerous regions, violations that stem from one worksite where no – or sometimes only a few – prior violations have occurred do not warrant remedial action. Unfortunately, unlike the General Counsel in the instant case, which has cited to the numerous labor violations in the relevant Postal District, these RDs – and the ALJ in this case – fail to recognize that there are often repeated violations within the Postal District involved, and certainly a multitude of repeated violations for the Postal Service nationwide.

As stated above, although the Union is reluctant to file unfair labor practice charges before exhausting its efforts with management directly, the RD responses described above have forced the NRLCA to change the way it handles situations in which the Postal Service fails to provide information in certain Postal Districts. Now, rather than working with various Postal Service representatives and giving the Postal Service three or four opportunities to provide information before filing a charge, we are forced to file after the first or second refusal. As a result, the number of charges that the NRLCA has filed during the past three years is more than double the number it filed in the four years prior to that. The adverse impact on the parties' labor-management relations, not to mention the Board's resources, is obvious. If the Union did not have to prove multiple unfair labor practice violations out of the same office before achieving an effective

remedy, it could continue its less litigious, more harmonious collective bargaining approach.

In addition, the leniency afforded to a recidivist employer such as the Postal Service eliminates any incentive for it to properly train its managers and supervisors or take other meaningful steps to prevent unfair labor practices. If the violations of a manager in one Postal facility do not impact the Postal Service beyond that office, where is the incentive to take any preventative measures? This Union spends well-over a million dollars per year training stewards not only because it wants to provide the best representation possible, but also because it has a legal obligation to ensure that its stewards – as agents of the Union – uphold their duty of fair representation. Should the Postal Service – or any large employer for that matter – not be held to a similar standard and incentivized to train its managers and supervisors to obey the National Labor Relations Act? If the employers such as the Postal Service believe they can weaken the Board's remedial efforts even after a complaint has issued by obtaining a unilateral settlement on its own terms, those entities are not going to take the necessary steps to prevent future violations.

Amicus recognizes that the situation described above typically stems from the General Counsel's lawful exercise of its prosecutorial discretion and that the General Counsel must factor in the limited resources of the Board. However, these circumstances still serve to illustrate the repercussions of ineffective remedies – remedies that are more likely to occur when ALJs impose unilateral "settlements" without consent from the charging party or General Counsel or, at the very least, without a full hearing that might better flesh out the issues impacted by the settlement.

c. Unilateral Settlements Threaten the Integrity of the NLRB and its Processes

In deciding whether to change its policy on ALJ-issued consent orders, the Board should consider the impact that unilateral settlements have upon how victims of unfair labor practices view the Board. Indeed, it is those very people and institutions – including this Union and its members – that must feel that they can appeal to the Board when a violation occurs. Yet, by creating a process by which the wrongdoer can achieve a settlement without input from the victim or the prosecutorial arm of the agency, the Board has undermined its own mission as the protector of labor rights. Victims lose confidence in the NLRB when the charged party alone can dictate the terms of a settlement. This can only drive people away from utilizing the Board to remedy unfair labor practices – a major negative consequence for the Board as well as the peaceful labor-management relations it seeks to maintain.

IV. CONCLUSION

For the foregoing reasons, *Amicus* strongly urges the Board to cease its practice of permitting ALJs to implement unilateral "settlement" agreements pursuant to consent orders over the objection of the General Counsel and the charging party. These unilateral results do not effectuate the purposes and policies of the Act.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March 2016, I caused a copy of the foregoing brief of *Amicus Curiae* National Rural Letter Carriers' Association to be served, by first-class mail, upon:

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